IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 364 of 2004

with

CRIMINAL REVISION APPLICATION No.392 of 2004

For Approval and Signature:

HON'BLE MR. JUSTICE M.D. SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

Cr.ra 364/04

MALIKBHAI MURADALI LAKHANI

Versus

SALMABEN MALIKBHAI LAKHANI

Appearance:

Party-in-person for petitioner.

Ms.Amee Yagnik for respondent no.1 and 2.

Mr.K.P.Raval, A.P.P. for Respondent No. 3-State.

Cr.ra 392/04

SALMABEN MALIKBAHI LAKHANI

Versus

MALIKBHAI MURADALI LAKHANI

Appearance:

MS AMEE YAJNIK for Petitioner No. 1-2
MR VIREN G DAVE for Respondent No. 1
Mr.K.P.Raval, A.P.P. for Respondent No. 2-State.

CORAM : HON'BLE MR. JUSTICE M.D. SHAH

Date of Order: 13/05/2005

C.A.V.JUDGMENT

1. Rule in both these applications. In Criminal Revision Application no.364 of 2004,learned Advocate Ms. Amee Yagnik waives service of rule on behalf of the respondent no.1 and 2 while Mr. K.P.Raval, learned A.P.P. waives service of rule on behalf of the respondent State while in Criminal Revision Application no.392 of 2004, learned Advocate Mr. Viren C.Dave waives service on behalf of the respondent no.1 while learned A.P.P. Mr. K.P.Raval waives service of rule on behalf of the respondent nO.2.

1.1 With the consent of the learned Advocates appearing on both sides, these matters are taken up for final hearing and disposal.

2. These two cross applications, namely, Criminal Revision Application no.364 of 2004 is preferred by the applicant-husband while Criminal Revision Application no.392 of 2004 is preferred by the applicant-wife against the same judgment and order dated 5th March 2004 passed by the Principal Judge, Family Court, Ahmedabad, in Criminal Misc. Application no.2205 of 2001 whereby the learned Judge awarded maintenance of Rs.4000/- to the -wife and Rs.1000/- to the minor son.

3. Since both these applications arise from the same judgment, they are heard together and are being disposed of by this common order.

4. In Criminal Revision Application no.364 of 2004, the applicant-husband has prayed for quashing and setting aside the order granting maintenance to the respondent wife and minor son of the applicant, while in Criminal Misc. Application no.392 of 2004, the applicant wife has prayed for enhancement of the maintenance amount awarded and also seeking a direction to the respondent-husband to deposit the amount of maintenance awarded by the learned Principal Judge, Family Court, Ahmedabad, in the impugned judgment and order.

5. It is the case of the applicant husband in Criminal Revision Application no.364 of 2004 that the respondent no.1-wife had deserted him and had also forcefully taken away the lawful custody of his minor son and his ancestral jewelry with the aid of her father and brother some time after the birth of minor son Sahil. According to the applicant-husband his marriage with the respondent-wife had been performed as per Shiya Imami Islamaili Muslim Rules. According to the applicant-husband the respondent-wife is a lawyer having Sanad and had also completed a course in Computer. According to the applicant-husband the efforts made by him for reconciliation failed. It was further alleged by the applicant-husband that the respondent-wife was not willing to extend conjugal rights to him and that the respondent-wife being a lawyer with Sanad wanted to practice in Ahmedabad and with a false motive to claim maintenance she had deserted him. It is also the case of the applicant-husband that the respondent wife had also approached the Conciliation and Arbitration Board as per the agreement of marriage entered into between them and and the Board by its order dated 7-1-2001 granted Rs.800/-per month to the respondent-wife against which both the parties went in appeal before the National Board and the Board by its order enhanced the amount of maintenance to Rs.3000/- from Rs.800/- and also permitted the respondent-wife to approach the Court holding that the applicant-husband had no intention to pay maintenance as he had hardly remained present in the proceedings. Accordingly, the respondent-wife also preferred Criminal Revision Application no.2205/01 claiming maintenance under Section 125 of the Criminal Procedure Code, 1973 before the Family Court and while the proceedings Criminal Revision Application was in progress, the applicant-husband moved an application on the ground that the trial Court had no jurisdiction in view of the provisions of Arbitration and Conciliation Act, 1996 which came to be rejected, Thereafter, the learned Principal Judge, Family Court, Ahmedabad, on the basis of the material placed before him, after hearing the parties passed the impugned judgment and order granting maintenance as stated in paragraph 1 of this judgment which is the subject matter of challenge in Criminal Revision Application no.364 of 2004

6. It is the case of the applicant in Criminal Revision Application no.392 of 2004, that the applicant wife and the respondent-husband entered into a wedlock on 12-10-1977 as per Muslim Shariyat and rituals and out of the said wedlock a son was born. According to the applicant-wife though their married life went smooth in

the beginning, after the birth of son-Sahil there arose disputes and differences owing to illegal demand of dowry by the respondent-husband from her which was followed by demands of huge amounts for starting computer center for the respondent's brother, washing machine, cupboard, acqua guard etc. It is further alleged by the applicant wife that the respondent husband then also started ill-treating her and giving threats of driving her out of the house. According to the applicant-wife day by day, the ill-treatment meted to her increased and finally she was driven out of the house on 24-5-1999 and thus the respondent-husband had deserted her and she had gone to her parental home. Thereafter, since the respondent husband had not cared to maintain herself and the minor son there being no source of income, she preferred an application before the Arbitration and Conciliation Board as per the marriage contract and the Board passed on order on 7th January, 2001 directing the respondent-husband to pay Rs.800/- towards maintenance against which both the parties preferred appeal before the National Board whereupon the Board had enhanced the amount of maintenance to Rs.3000/- from Rs.800/- and also permitted the applicant-wife to approach the Court since the respondent-husband had absented himself in the proceedings before the Board and had no intention to pay the maintenance. It is under these circumstances, that the applicant-wife had filed Criminal Misc.Application no.2205/05 before the learned Principal Judge, Family Court, Ahmedabad, who by his order dated 5-3-2004 awarded maintenance as stated in paragraph 1 of this judgment. However, the respondent-husband having failed to deposit the arrears as ordered and being aggrieved by the quantum of maintenance awarded, the applicant-wife has knocked the doors of this Court by way of Criminal Revision Application no.392 of 2004 claiming enhancement of the maintenance amount awarded and also seeking a direction to the respondent-husand to deposit the arrears of maintenance as per the impugned order.

7. Learned Counsel for the husband in both these applications has raised several contentions, however, I deem it proper to deal with and decide only the contentions that are necessary for determining the controversy involved in these two cross applications. Firstly, it has been argued by the learned Counsel for the husband in both these applications that wife has not come before the Court with clean hands and has not disclosed the material facts before the Court inasmuch as that she has preferred parallel proceedings on the same subject matter in Criminal Misc.Application no.2205/01 before the Family Court and the proceedings under the

Arbitration and Conciliation Act. According to the learned Counsel, therefore, the trial Court had no jurisdiction to entertain the Criminal Misc.Application. I do not find merit in these submissions as the wife can take recourse to file application under Section 125 Cr.P.C. even after filing the Arbitration and Conciliation proceedings (See Ram Lotan Singh Mahnni Lal Singh reported in Cri.L.J. 318) The proceedings of Criminal Miscellaneous Application is an independent proceeding and the wife is entitled to file such application. It was next argued that the wife had not been cross-examined by the learned Judge of the Family Court. It is evident from the record of the case that the matter was kept for cross-examination of the wife but on account of the negligence of the husband in not remaining present and not even keeping his learned Advocate present as a result of which the evidence given by the wife in her examination-in-chief had gone unchallenged and uncontradicted. Therefore, this submission also cannot be accepted. The learned Counsel next contended that the wife is not willing to cohabitate with the respondent and is not fulfilling her conjugal marriage rights. This contention also stands raised to the ground in view of the fact that the record shows that the husband has neither cared to bring back the wife and minor child to his place nor has he paid any amount towards maintenance though ordered. He has also not preferred any application before any forum for restitution of conjugal rights. It was next contended by the learned Counsel for the husband that Conciliation and Arbtiration Act, 1996 has an overriding effect to the Family Court Act,11984 which in my opinion also cannot be accepted in view of the fact that proceedings under Section 125 Criminal Procedure Code is an independent remedy as held in Ram Lotan Singh's case (Supra). The contention as regards non compliance of mandatory provisions of Section 5 of part-I of the Arbitration and Conciliation Act, 1996 also merits no acceptance for the same reason.

7.1 The learned Counsel for the husband has placed reliance on several decisions rendered by the Apex Court as well as various High Courts. I have carefully scanned these authorities and I find that they do not apply to the facts situation in the present case since the authorities cited are decisions on facts, and on facts no two cases could be similar. Reference in this connection may be had to the decision rendered in the case of MUNICIPAL COMMITTEE, AMRITSAR v. HAZARA SINGH (1975) 1 SCC 794 AND (2) wherein at paragraph 4 of the judgment, the Honourable Supreme Court while holding that

statements on matters other than law have no binding force has pointed out the the decisions in Gurcharan Singh v. State of Gujarat and Prakash Chandra Pathak v. State of Uttar Pradesh in which it has been observed that as on facts no two cases could be similar, its own decisions which were essentially on question of fact could not be relied upon as precedents for decision of other cases. There is another decision on the point rendered in the case of Prakash Chandra Pathak v. State of Uttar Pradesh reported in AIR 1960 SC 195 wherein at paragraph 8 of the judgment it has been observed that:

> "Decisions even of the highest court on questions which are essentially questions of fact cannot be cited as precedents governing the decision of other cases which must rest in the ultimate analysis upon their own particular facts. The general principles governing appreciation of circumstantial evidence are well established and beyond doubt or controversy. The more difficult question is one of applying those principles to the facts and circumstances of a particular case coming before the Court. That question has to be determined by the Court as and when it arises with reference to the particular facts and circumstances of that individual case. It is no use, therefore, appealing to precedents in such matters. No case on facts can be on all fours with those of another."

There is yet another decision rendered in the case of Rahim Khan v. Khurshid Ahmed and Ors. reported in AIR 1975 SC 290 wherein it has been held by the Honourable Supreme Court at paragraph 20 of the judgment as under:

> "Precedents on legal propositions are useful and binding but the variety of circumstances and peculiar features of each case cannot be identical with those in another and judgments of Courts on when and why a certain witness has been accepted or rejected can hardly serve as binding decisions."

8. Learned Counsel for the wife in both these applications while supporting the judgment and order of the learned Principal Judge of the Family Court has submitted that the High Court can enhance the maintenance considering the fact that the husband is a highly salaried person with no dependable members and therefore the reasonable amount of maintenance would be

Rs.11,200/-calculating 25% of the income of the husband towards her maintenance and 15% of the income of the husband towards the maintenance of the minor son. As regards the question of maintenance, the aggregate income of the husband is Rs.24,000/- and net income is Rs.16,000/- he being a Medical Officer, Class II in Gujarat Public Health Service, the pay slip in respect of which is on the record of the case. This salary would increase from time to time and considering this aspect the learned Family Court Judge has rightly believed the theory of ill-treatment meted out to the wife and husband having deserted her, as the same is based on the evidence on record which remained uncontroverted, and therefore, rightly awarded maintenance to the tune of Rs.4000/-per month to the wife and Rs.1000/- to the minor child which is fair just and reasonable. The claim for enhancement of maintenance by the wife, therefore, cannot be accepted. Learned Counsel for the wife has placed reliance on certain authorities in support of her claim for enhancement of maintenance amount. However, I do not deem it necessary to refer to and deal with the same as I am of the view that the learned Family Court Judge has not fallen into error in fixing the amount of maintenance.

9. On the basis of the aforesaid discussion, I am of the considered opinion that there being no substance in Criminal Revision Application no.364 of 2004 the same deserves to be dismissed while Criminal Revision Application no.392 of 2005 deserves to be partly allowed. I am fortified in my view by the decisions rendered by the Honourable Supreme Court in (1) PREM LATA SAHAI V. RAM NIRANJAN SAHAI AND OTHERS reported in 1991 SCC (Cri.) 236 and (2) LATILUNNISA USMANKHAN V. SAIYED AHSRAFALI AHMEDALI AND ANOTHER reported in 1986 G.L.H. 254 wherein it has been held that the High Court in exercise of revisional jurisdiction cannot interfere with the order of maintenance considering the plight of deserted woman.

9. In the result, Criminal Revision Application no.364 of 2004 is dismissed.The judgment and order passed by the learned Principal Judge of the Family Court, Ahmedabad, is hereby confirmed. The applicant-husband is directed to pay the arrears of maintenance to the respondent=wife as directed by the learned Family Court Judge vide order dated 5th March, 2005. Rule is discharged. Criminal Revision Application no.392 of 2004 is partly allowed. The claim for enhancement of maintenance is disallowed. Rule is made absolute accordingly.

(M.D.Shah,J.)

stanley-mds.